JD(SF)–77–03
Monterey, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

RALEY'S SUPERMARKETS AND
DRUG CENTERS

and Case 32-CA-20049-1

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 839, AFL-CIO

Virginia Jordan, Oakland, CA,
for the General Counsel.

Patrick W. Jordan, San Rafael, CA,
for the Respondent.

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge: I heard this case in trial at Salinas, California on August 5, 2003. On October 2, 2002, United Food and Commercial Workers Union, Local 839, AFL-CIO, (the Union) filed the charge alleging that Raley's (Respondent or the Employer) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On December 31, 2002, the Regional Director for Region 32 of the National Labor Relations Board issued a Complaint and Notice of Hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (5) of the Act. Respondent filed timely answers to the complaint denying all wrongdoing.

The essential issue is whether Respondent failed and refused to provide the Union with information relevant to the Union's processing of certain contractual grievances and necessary for the proper performance of its representative duties in violation of Section 8(a)(1) and (5) of the Act.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses[1] and having considered the post-hearing briefs of the parties, I make the following:

Findings of Fact and Conclusions

I. Jurisdiction

Respondent, a California corporation, with offices and places of business in various locations in the State of California, has been engaged in operating retail grocery stores. During the twelve months preceding issuance of the complaint, Respondent received gross revenues in excess of $500,000 and purchased and received at its California locations goods valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts and Issues

Respondent is engaged in the business of operating grocery supermarkets and drug centers. Among its retail grocery operations are 26 Nob Hill Foods stores, including a store number 612, located in Monterey, California. The Union represents employees at approximately 8 of the 26 Nob Hill stores. The Union and Respondent have been engaged in a long-term collective bargaining relationship. The parties collective-bargaining agreement consists of two agreements which must be read together – the 1997-2001 collective-bargaining agreement and the September 2002 memorandum of agreement extending the 1997-2001 agreement until September 2004.

On May 2, 2002, the Union filed a grievance on behalf of employee Peggy Taylor alleging that Respondent's managers had harassed and discriminated against Taylor. In addition to the cessation of the alleged harassment and discrimination, the Union sought a transfer for Taylor and reimbursement for travel expenses.

On May 3, 2002, the Union filed a grievance on behalf of employee Yolanda Huerta alleging that Respondent had harassed and discriminated against Huerta. In addition to the end of the alleged harassment and discrimination, the Union sought a transfer for Huerta and reimbursement of travel expenses.

Respondent acknowledged receipt of these grievances stating:

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[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings therein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

> The Company appreciates you bringing these concerns to our attention, as we are committed to providing a workplace free from harassment and discrimination. The Company takes these types of concerns seriously and will be conducting a thorough investigation of [both employees'] allegations. . . . Once we have conducted our investigation, we will be responding to you regarding our findings and the outcome.

On May 21, Chris Clark, a senior human resource manager, and human resource manager JoAnn Pingree, met with Huerta and Taylor to investigate the allegations against Respondent's supervisors. Following these meetings, Clark and Pingree met with certain employees named by Taylor and Huerta as having relevant information regarding the allegations against Respondent's supervisors. In addition Pingree and Clark met with the supervisors against whom the allegations were made. According to Respondent's attorney, Taylor and Pingree interviewed approximately 20 employees and managers.

On July 18, Clark wrote Debbie Willis, the Union's secretary/treasurer, stating that the investigation had been completed. In pertinent part, the letter stated, " recently, the Company completed a thorough investigation regarding the allegations brought forth by Ms. Huerta and Ms. Taylor. Based on our investigation we feel that we have taken the appropriate action and therefore, the Company considers this matter closed.''

On July 26, Willis wrote Clark a letter requesting information, which is one basis of the instant complaint:

> The Union is in receipt of your letter dated July 18, 2002 regarding the investigation into the complaints lodged by Huerta & Taylor. We are confused by its content and ask that you clarify the statement that the company considers the matter closed.
>
> 1. What matter is considered closed?
> 2. Is your letter a response to the grievance filed on behalf of Huerta and Taylor or your Human Resource investigation?
> 3. Have Ms. Huerta and Ms. Taylor been informed of your investigation result?
> 4. What action or corrective measures was taken by the company to address their concerns
>
> It is the Union's position that Ms. Huerta and Ms. Taylor should be fully informed of the investigation results. Did the assistant store manager and others act inappropriately and if so, what corrective action was taken. These ladies cooperated fully with the company and deserve a response.
>
> Further, we do not consider the grievance the Union filed on their behalf resolved. These grievances are still alive and we are requesting a board of adjustment as outlined in Section 18 of the collective bargaining agreement. We are also requesting a copy of all reports made by company pertaining to the investigation.

Respondent did not reply to Willis' July 26 letter. Thus, on August 21, the Union's attorney wrote Respondent's director of labor relations. The letter made the following request for information, which also forms a basis of the complaint: "[t]he Local requests a copy of the investigator's report on the specific allegations of inappropriate behavior. Were they sustained

or rejected and why? . . . We insist that the Company summarize the pertinent findings as to specific allegations."

In August, Willis met with Respondent's director of labor relations at a board of adjustment regarding Huerta's grievance. Respondent took the position that Huerta's grievance had been resolved and that therefore, Respondent was not obligated to furnish information regarding its investigation. Respondent took the position that a charge had been filed with a State agency and, therefore, Respondent would not prejudice its defense by furnishing any further information.

Respondent asserts in its brief that during the investigation of the instant case, in December 2002, its attorney notified the Regional Director that no written investigative reports or written witness statements existed. In an attempt to resolve the pending charge, in January 2003, Respondent's attorney gave the Union and the Region a written summary of the information it obtained during the investigation of Huerta's and Taylor's allegations. Respondent did not provide information regarding "what, if any disciplinary action was taken with respect to its supervisors, and what evidence it relied upon in reaching its determination." Further, Respondent provided the names of some but not all of the names of the 20 persons allegedly interviewed during the investigation.

The grievances filed on behalf of Taylor and Huerta are still pending. The Union has not yet decided whether to take these grievances to arbitration. Willis testified that under the collective-bargaining agreement there are no time limits which bar the Union from taking these grievances to arbitration.

B. Discussion and Findings

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees, subject to the bargaining unit provisions of Section 9(a). The duty to bargain in good faith requires an employer to furnish information requested and needed by the employees' bargaining representative for the proper performance of its duties to represent unit employees of that employer. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). A union's request for information regarding the terms and conditions of employment of the employees employed within the bargaining unit represented by the union, is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties, *Samaritan Medical Center*, 319 NLRB 392, 397 (1995), because such information is at the "core of the employee-employer relationship," *Graphics Communications Local 13 v. NLRB*, 598 F.2d 267, 271 fn. 5 (D.C. Cir. 1959), and thus it is relevant by its "very nature." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971).

Therefore, an employer's statutory obligation to provide information presupposes that the information is relevant and necessary to a union's bargaining obligation vis-à-vis its representation of unit employees of that employer. *White-Westinghouse Corp.*, 259 NLRB 220 fn. 1 (1981). Whether the requested information is relevant and sufficiently important or needed to invoke this statutory obligation is determined on a case-by-case basis. *Id.*

In making this determination of relevance, the Board has followed the following principles:

> Wage and related information pertaining to employees in the bargaining unit is presumptively relevant, for, as such data concerns the core of the employer-

> employee relationship, a union is not required to show the precise relevance of it, unless effective employer rebuttal comes forth; as to other requested data, however, such as employer profits and production figures, a union must, by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires.

Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965), cited with approval in *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

> Thus, if the requested information goes to the core of the employer-employee relationship, and the employer refuses to provide that requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why it cannot, in good faith, supply the information. If the information requested is shown to be irrelevant to any legitimate union collective-bargaining need, however, a refusal to furnish it is not an unfair labor practice.

Coca-Cola Bottling Co., 311 NLRB at 425 (*citing Emeryville Research Center v. NLRB*, 441 F.2d 880 (9th Cir. 1971)).

The standard to determine a union's right to information will be "a broad discovery type standard," which permits the union access to a broad scope of information potentially useful for the purpose of effectuating the bargaining process. *NLRB v. Acme Industrial*, 385 U.S. at 437, fn. 6; *See Also Anthony Motor Co., Inc.*, 314 NLRB 443, 449 (1994). There only needs to be "the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial*, 385 U.S. at 437. Although information pertaining to unit employees is generally considered presumptively relevant, with respect to non-unit personnel, however, "the burden is upon the union . . . to establish relevance without the benefit of any presumption." *E.I. DuPont & Co. v. NLRB,* 744 F.2d 536, 538 (6th Cir. 1984). In order to establish relevancy of information pertaining to non-unit employees, the requested information must be relevant to the union's statutory duty and obligations. *Safeway Stores*, 240 NLRB 836, 837-38 (1979). In other words, it must be "related to the Union's function as bargaining representative and reasonably necessary to performance of that function." *Curtiss-Wright Corp. v. NLRB,*347 F.2d 61, 68 (3d Cir. 1965).

In *Pennsylvania Power and Light Company*, 301 NLRB 1104-1104-05 (1991) the Board stated:

> In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided. In this regard, the relevancy of information and the concomitant duty to furnish it are not affected by whether the request for information is made at the grievance stage or after the parties have agreed to arbitration. This is so because the goal of the process of exchanging information is to encourage resolution of disputes, short of arbitration hearings, briefs, and decision so that the arbitration system is not "woefully overburdened." Moreover, information of "probable relevance" is not rendered irrelevant by an employer's claims that it will neither raise a certain defense nor make certain factual contentions, because "a union has the right and the responsibility to frame the issues and advance whatever contentions it believes may lead to the successful resolution of a grievance." Further, because the Board, in passing on an information request, is not concerned with the merits of the grievance, it is also not "willing to speculate regarding what defense or defenses an employer will raise in an arbitration proceeding." [Citations omitted]

With respect to internal investigations, such as involved in the instant case, the Board requires an employer to disclose the names of the individuals whom it interviewed. *Boyertown Packaging Corp*., 303 NLRB 441, 444 (1991). However, an employer has no obligation to furnish the statements of employee witnesses. *Anheuser-Busch, Inc.,* 237 NLRB 982, 984-985 (1978); *Manchester Health Center*, 287 NLRB 328 (1987). Likewise, there is no requirement to furnish summaries of witness statements. *Boyertown Packaging, supra*, at 444. Moreover, the Board has held that an employer is not required to give opinions, comments or recommendations of those who conducted the investigation. *U. S. Postal Service*, 305 NLRB 997, 1007 (1991).

In *U.S. Postal Service*, 301 NLRB 709 (1991) cited by the General Counsel, the respondent-employer terminated a bargaining unit employee for falsifying an employment application. The charging party-union requested disciplinary records regarding three supervisors who had been disciplined for falsifying postal service documents. The Board held that the supervisors' disciplinary information was relevant to determine whether a unit employee was given harsher treatment and thereby disparately treated. See also *U.S. Postal Service*, 289 NLRB 942 (1988)(discipline records of supervisors allegedly engaged in same activity held relevant to grievance of discharged employee).

Respondent seeks to distinguish *U.S. Postal Service*, 301 NLRB 709 (1991) and *U.S. Postal Service*, 289 NLRB 942 (1988) on the ground that those cases held that disciplinary records of supervisors were relevant only to the issue of disparate treatment of employees with regard to discipline. Here, the Union seeks information regarding the discipline of supervisors in order to argue that the supervisors committed wrongs against the grievants and/or that the supervisors were not adequately disciplined. The adequacy of the discipline of the supervisors does not appear to be relevant to the Union's performance as bargaining representative. The issue is whether the information regarding the discipline of supervisors, if any, is relevant to the question of whether Respondent discriminated against the employees represented by the Union, Taylor and Huerta.

It appears Respondent has no obligation under the Act to furnish the statements of employees or supervisors, even if they exist. Likewise, Respondent is not required to furnish summaries of witness statements or give the opinions, comments or recommendations of the managers who conducted the investigation. Thus, it appears the Board would not require Respondent to explain to the Union its basis for its managerial actions regarding the discipline, or lack thereof, of supervisory employees. Under these circumstances, an order that Respondent inform the Union of its interactions with its supervisors seems empty and irrelevant. Information as to whether Respondent gave training, reprimands or even transfers to the supervisors does not establish evidence of wrongdoing. I believe requiring an employer to furnish the Union with such information would be poor public policy because it would have a tendency to discourage employers from taking preventive or corrective action. Accordingly, I shall recommend that the Board issue no remedial order in this case.

Further, in this case, the Union's requests for information appear similar to requests for pretrial discovery. The Board has held that Section 8(a)(5) is not to be used as a device to secure pretrial discovery in arbitration proceedings. *See California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362 (1998); *Toll & Die Maker's*

Lodge 78 (Square D Co.), 224 NLRB 112 (1976); *Cook Paint & Varnish Co.,* 246 NLRB 646 (1979), enfd. denied on other grounds 648 F.2d 712 (D.C. 1981).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of the Section 2(5) of the Act.

3. The General Counsel has failed to establish that Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:[2]

ORDER

The complaint shall be dismissed.

Dated: October 27, 2003, San Francisco, California.

_____
Jay R. Pollack
Administrative Law Judge

[2] All Motions inconsistent with this recommended order are hereby denied. In the event that no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.